

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 76 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO
1 to 5 No

HEIRS OF PATEL OTAMDAS DHANDAS

Versus

KANUBHAI @ KANJIBHAI GANGARAM

Appearance:

MR. RN SHAL for MR. C.N. DESAI for Petitioners
MR SR SHAH for Respondent No. 1, 5, 6, 7, 8
MR PS SHAH for Respondent No. 2

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 23/07/1999

ORAL JUDGEMENT

1. The present appellants - original plaintiffs filed a Civil Suit before the Civil Judge (JD), Mehsana, being Regular Civil Suit No. 390 of 1973 for declaration of right of easement. It was the case in short of the

plaintiffs that they were the joint owners of the field Survey No. 70, situated in the sim of village Diwanpura and that the fields of the defendants are situated to the east and south of the said field. The plaintiffs further stated that their way to the field is from village

Diwanpura and passing from near the village pond and then through the nalia situated to the north thereof so as to reach near the western boundary of Survey No.90 belonging to the defendant No.1. According to the plaintiffs, the way thereafter proceeds through the southern border of Survey No.85 belonging to defendant No.2 and then through the eastern border of the said field Survey No.85 so as to enter into Survey No.83. The plaintiffs have further stated that the said way thereafter ran along the western border of Survey No. 83/2 belonging to defendant No.3 and thereafter through the western border of Survey No.83/1, belonging to defendant No.4. The plaintiffs further stated the said way reaches to the Chowk at the junction of Survey Nos. 85 and 86 on their eastern borders and thereafter it went towards Survey No. 71/1 belong to defendant No.5 along with its western border and then the way reaches to the field Survey No.70. It was further stated that this way has been used by plaintiffs and their ancestors since more than 50 years for the purposes of taking bullocks, implements of agriculture, carts and also to go on foot and, therefore, they acquired the said right of easement under prescription because of the use of the above mentioned way since more than 20 years openly, peaceably and without interference. Defendants have resisted the suit and stated that no such way is in existence and that the way of the plaintiffs to approach their field is not the suit way, but, the way of the plaintiff is from the other branch of the nalia bifurcating near the village pond and going towards the western side and beyond the said

bifurcation of nalia, the way ran through the government open and waste land of Survey Nos. 46 to 51 and thereafter into the said nalia running towards Mudarda and Ambasan. According to the defendant, thereafter, the way of the plaintiffs proceeded further towards north and turned towards east where Mudarda Ambasan nalia touches in another nalia known as Khadalpur Bhasaria nalia going towards eastern direction. The defendants further stated that the plaintiffs have not used the disputed way for taking agricultural implements, carts, bullocks or any other purpose..

2. The trial court after considering the rival

contentions of the parties and taking into account the evidence on record, decreed the suit relying on the oral evidence of the plaintiff and the panchnama of the commissioner and map produced by the plaintiffs. Being aggrieved, the defendants filed an Appeal before the District Court at Mehsana, being Regular Civil Appeal No. 14 of 1980. Joint District Judge, Mehsana heard the Appeal and came to the conclusion that the fields of the plaintiff were purchased by the ancestor in 1954, however, the ancestor of the plaintiff was in possession of the said fields which can be said as dominant fields right from 1951-52. The District Court observed that there is no mention of suit way in the registered deed by which the ancestor purchased the suit field in 1954. If the suit field was in possession of the ancestors of the plaintiff right from 1951 - 52, then, in all probabilities, the existence of suit way must have been

been mentioned in the documents of sale, which is registered deed, but, there is no mention of suit way in the deed and, therefore, the District Court allowed the Appeal and set aside the decree passed by the trial court.

3. The District Court has taken into account the facts and the evidence of the case very correctly and has appreciated the evidence in judicial manner. In fact, there was no sufficient evidence except the oral evidence of the plaintiffs to come to the conclusion that the plaintiffs are using the said suit way since last 50 years and hence, no interference at all is required in the decision of the first appellate court. Therefore, the following order is passed.

4. " The Second Appeal is dismissed with no order as to costs".

p.n.nair